

U.S. Department of Labor

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April 6, 2017

VIA FACSIMILE

The Honorable Steven B. Berlin
UNITED STATES DEPARTMENT OF LABOR
Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

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APR 07 2017

Office of Administrative Law Judges
San Francisco

Re: OFCCP v. Google Inc., Case No. 2017-OFC-00004, Opposition to
Defendant Google Inc.'s Request for Protective Order or to Seal
Documents

Your Honor:

At 5:39 p.m. tonight Google submitted emailed us their Motion for Protective Order. Per yesterday's pre-trial conference, our expectation was that this Court would set a briefing schedule and OFCCP would have an opportunity to evaluate Google's requests and proposed order. Instead, Google filed its motion without first providing us any explanation as to the nature and purpose of the specific requests with regard to specific documents. While OFCCP is open to discuss pairing back specific exhibits and perhaps agreeing that specific material in exhibits be sealed, OFCCP's position is that Google's motion is procedurally improper for the reasons stated herein and should therefore be denied. If this Court decides to entertain the motion, OFCCP requests that it be afforded the opportunity after the hearing to provide a more thorough briefing. This letter nevertheless highlights OFCCP's substantive concerns.

1) Google's Motion should be Denied for Procedural Reasons.

Google's Motion for a Protective Order and to Seal Exhibits was brought literally on the eve of the hearing in violation of the procedural rules, and without providing sufficient information for the court to conduct a "good faith balancing test" and determine that the harm to Google would overcome the strong presumption against entering protective orders in cases involving government agencies and matters of public concern.

The "General Provisions" of this Court's rules governing administrative proceedings instituted by OFCCP unambiguously provide that absent an order of this Court, all "papers and pleadings are public documents."¹ Google's motion to seal or for protective order must be denied because the case is governed by the expedited hearing procedures, and court has already ruled that these procedures do not allow for motions. As stated in the Order Denying Plaintiff's Motion for Summary Judgment, "the expedited procedures include no provision for pre-hearing or post-hearing motions," with several limited exceptions that does not include a motion for protective order. *OFCCP v. Google Inc.*, Order Denying Plaintiff's Motion for Summary

¹ Google attempts to argue that the confidentiality provisions contained in 41 C.F.R. § 60-1 continue to apply in enforcement proceedings. However, the regulations are abundantly clear that once enforcement proceedings are instituted, this Court's rules are applicable and absent a Court order, filings are simply not confidential.

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Judgment, p.2. The expedited procedures contain no reference to procedures or authority to enter protective orders or seal documents.' As with a motion for summary judgment, "[t]here is not reference—express or implied—to the procedures established for such motions in ordinary cases."

Even if the general procedural rules applied, Google did not comply with them. The procedural rules governing OFCCP proceedings allow a responding party ten days to respond to a motion. 41 C.F.R. §60-30.8(a). While an Administrative Law Judge may deny a motion without awaiting the response, the rules prohibit him from granting a motion without allowing the responding party 10 days to respond or holding a hearing. 41 C.F.R. §60-30.8(b) ("The Administrative Law Judge may not grant a written motion prior to expiration of the time for filing responses thereto, except upon consent of the parties or following a hearing, but may overrule or deny such motion without awaiting response: *Provided*, That prehearing conferences, hearings, and decisions need not be delayed pending disposition of motions."). Here, Google waited until two days before the hearing—in a case that has been pending for more than three months—to even mention a protective order. The actual motion was filed after business hours on the night of the hearing, giving OFCCP no time to respond, and certainly not the 10 days required by the rules governing motion practice in OFCCP proceedings.

Furthermore, Google has not met the prerequisite of conferring in good faith in an effort to resolve the dispute without the judge's action, as required by 29 C.F.R. §18.52. This case was filed on December 29, 2016, specifically alleging that Google failed to produce "items relevant to Google's compensation policies," including a compensation data and names and contact information of employees. Complaint ¶ 9. In February, the ALJ ordered that a hearing would be held, and it became clear on March 15 that the hearing would not be avoided through dispositive motion practice. Yet, Google did not even mention its desire for a protective order and seal documents until April 5, 2017, two days before the hearing. It did not indicate the specific information to be protected until the morning of April 6 and no reasoning was provided to OFCCP until the motion itself was filed.

Given the Eleventh Hour nature of its motion and the utter lack of compliance with any of this Court's procedural rules in bringing this motion, this Court should deny the motion.²

2) Google has Not Met the Standards for Obtaining a Protective Order.

As Google's motion was filed this evening, OFCCP has not been afforded a meaningful opportunity to set out its opposition. As such, should this Court entertain the Motion, OFCCP requests additional time. However, for the reasons provided below, OFCCP believes the protective order should be denied.

Google has not met its burden in establishing that the protective order is warranted. As courts have recognized, the proponent of a protective order bears the burden of establishing good cause, showing, *as to each document*, that "disclosure will work a clearly defined and serious injury to the party seeking closure." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d

² On April 5, 2017, this Court struck OFCCP's second and third sets of RFAs, which were timely served under the express language of the Rules, by deeming them untimely in relation to the hearing date. Google's delay here is far less explicable.

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Cir. 1994); *see also Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002). Broad allegations of harm, such as those made by Google, are insufficient to meet their burden of establishing good cause. *Phillips*, 307 F.3d at 1211. In *EEOC v. Kronos*, 620 F.3d 287 (3d Cir. 2010), the Third Circuit vacated a protective order entered in an employment discrimination case brought by the EEOC. The court held that the lower court had abused its discretion by failing to articulate the required good cause balancing test before entering the protective order. *Id.* at 303.

The good faith balancing test balances public interests against private interests. Public interests weigh against sealing documents in this case. If the matter concerns a “government agency and matters of legitimate public concern,” the threshold for sealing information is elevated. *Pansy*, 23 F.3d at 788. Here, where the Freedom of Information Act applies, a “strong presumption against entering” a protective order exists:

where it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information pursuant to the relevant freedom of information law. In the good cause balancing test, this strong presumption tilts the scales heavily against entering or maintaining an order of confidentiality.

Id. at 791; *see also Kronos*, 620 F.3d at 302. Obviously, Google only seeks to protect information that would be disclosed, despite the protections of the Freedom of Information Act and other statutes. Information already protected needs no further protection. Thus, the strong presumption against a protective order applies.

The public interest is even greater in this case, where Google is a large, well-known company that purports to be a leader in increasing diversity “across the tech industry,” and has voluntarily disclosed its EEO-1 diversity data to “spark a conversation.” *See* Nancy Lee, Vice President, People Operations, “Focusing on diversity” <https://blog.google/topics/diversity/focusing-on-diversity30/>. Now that Google has claimed to be open about diversity issues, even providing detailed guidance to employers on addressing compensation issues,³ and having worked to raise awareness of this issue, it should not seek to foreclose the production of information that would otherwise be available through the Freedom of Information Act.⁴

Furthermore, even if this Court had sufficient information to apply the good cause balancing test and determine that good cause supported entering a protective order, it would need to narrowly tailor the protective order to the specific needs of the case. As noted after the court entered a much narrower protective order upon remand of the original *Kronos* decision, even after a court determines that a protective order may be warranted, “we must still consider whether the scope of the confidentiality provisions issued by the District Court were proper.” *EEOC v. Kronos*, 694 F.3d 351, 368 (3rd Cir. 2012); *see also U.S. Steel Corp. v. United States*,

³ *See* <https://rework.withgoogle.com/guides/pay-equity/steps/structure-your-pay-process/>.

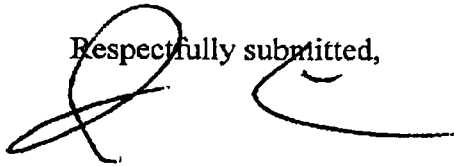
⁴ While Google has not suggested that the hearing be closed or testimony sealed we note that the Department of Justice has expressed a “societal interest in open proceedings.” *See* 28 CFR § 50.9.

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730 F.2d 1465, 1468 (Fed.Cir.1984) ("Meaningful increments of protection are achievable in the design of a protective order. It may be that particular circumstances may require specific provisions in such orders."). In short, every protective order is *sui generis*, the product of a unique balancing of competing interests viewed against the totality of the circumstances. 21 *Pikes Peak Family Housing, LLC v. U.S. United States Court of Federal Claims*, 40 Fed.Cl. 67342 Cont.Cas.Fed. (CCH) P 77, 280 (April 7, 1998). Here, since Google has asked for entire exhibits to be sealed without explaining why the protective order is needed with regard to each specific exhibit, let alone the specific information supplied within each exhibit. Based on Google's failure to make any specific argument, it is impossible to determine whether the protective order it seeks will be narrowly tailored to this case.

In conclusion, Google failed to meet any applicable procedural requirements for seeking a protective order in the case and failed to provide sufficient information to meet its burden of establishing good cause. Strong public interest supports disclosure of any information in this proceeding that it not protected from disclosure by FOIA, the Privacy Act, or other laws. Accordingly, OFCCP respectfully requests that any motion for protective order or motion to seal be denied.

Respectfully submitted,



Ian H. Eliasoph
Counsel for Civil Rights

Cc (via email): Lisa Barnett Sween, Esq.
Matthew Camardella
Daniel Duff
Antonio Raimundo

*** Receive Results ***

Receive job successful.

Job No.	9640
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FAX COVER SHEET

TO

COMPANY

FAXNUMBER 14156252201

FROM Stanford M.J. Manuia

DATE 2017-04-07 02:51:01 GMT

RE 040617 request on behalf of Benjamin W.O. Kuhaulua III re Case
No. 2017-WPC-00001

COVER MESSAGE

April 6, 2017

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San Francisco, Ca

Matthew M. Bracken, Esq.
Office of the County Attorney
4444 Rice Street, Suite 220
Lihue, Kauai, Hawaii 96766

RE: Benjamin W.O. Kuhaulua III's request for continuance of deadlines and Hearing on April 24,
2017
for Case No. 2017-WPC-00001

Dear Gentlepersons:

This supplements mine dated March 23, 2017 which was submitted on behalf of Benjamin W.O. Kuhaulua III, and addresses the concerns raised by the ORDER DENYING CONTINUANCE; NOTICE OF PRETRIAL CONFERENCE issued on March 31, 2017.

Appended hereto please find a copy of Lynn Pizzitola MS MFT's report dated April 5, 2017, which addresses the concerns raised by the ORDER DENYING CONTINUANCE; NOTICE OF PRETRIAL CONFERENCE and is being submitted in support of Mr. Kuhaulua's request for continuance and extensions of deadlines for the litigation of Case No. 2017-WPC-00001. Mr. Kuhaulua is requesting an extension of six (6) months for the Hearing currently scheduled for April 24, 2017.

Please continue to guard Mr. Kuhaulua's right to confidentiality regarding his recommended course of psychological treatment. And as prescribed by the NOTICE OF HEARING AND PRETRIAL ORDER issued November 15, 2016, please consider this supplemental submission as a request to file by fax and email.

FAX
TRANSMITTAL

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Date: 4/6/2017To: The Hon. Steven B. BerlinCompany /
Organization: DOL - OALJFAX No. / Tel. No: 415-625-2201From: Ian Eliason, 415-625-7746Re: OFCLP v. Google, 2017-OFL-00004Pages: 5 (including this cover sheet)

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Office of Administrative Law Judges
San Francisco, Ca

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